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No. 99-___

In The

Supreme Court of the United States

AIRPORTS COUNCIL
INTERNATIONAL–NORTH AMERICA,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997, the District of Columbia Circuit rejected the Secretary of Transportation's decision finding unreasonable Los Angeles' fair market value-based airfield land rental charge. The court concluded that the Secretary had fundamentally misunderstood the governing law in requiring the use of historical cost valuation. *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027, 1032 (D.C. Cir. 1997). On remand the Secretary again determined the fee to be unreasonable. Thereafter, in a decision that is irreconcilable with the prior decision, a divided D.C. Circuit upheld the Secretary's determination. *City of Los Angeles v. DOT*, 165 F.3d 972 (D.C. Cir.), *reh'g denied en banc*, 179 F.3d 937 (D.C. Cir. 1999).

1. In requiring State and local governments to subsidize commercial airlines by interpreting the federal airport grant statute retroactively to impose unstated conditions, did the Secretary violate the clear statement requirement of *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)?

2. By forbidding States and other governmental owners of the Nation's principal airports from using any methodology other than historical cost in valuing airfield land provided for airlines' use, did the Secretary violate (1) the provisions of the Anti-Head Tax Act (49 U.S.C. § 40116 *et seq.*), as interpreted by *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994), (2) the Airport and Airway Improvement Act (49 U.S.C. § 47107(a) *et seq.*), (3) the Federal Aviation Administration Authorization Act (49 U.S.C. § 47129), (4) the Tenth Amendment to the Federal Constitution, and (5) established principles of federalism and comity?

PARTIES TO THE PROCEEDING

Petitioner Airports Council International–North America ("ACI-NA") represents the state and local governmental bodies that own and operate the nation's principal airports. ACI-NA was an intervenor in each of the prior D.C. Circuit appeals, and in the administrative proceedings below, because of the importance of the issues presented.

The City of Los Angeles, the City of Los Angeles Department of Airports and the Los Angeles Board of Airport Commissioners, who own and operate Los Angeles International Airport ("LAX"), have also filed a Petition for a Writ of Certiorari in this matter.

The respondents are the Department of Transportation, Rodney E. Slater, Secretary of Transportation, and Patrick V. Murphy, Deputy Assistant Secretary for Aviation and International Affairs. The Air Transport Association of America intervened in the underlying litigation and filed a brief in support of respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Airports Council International–North America respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 5, 1999.

OPINIONS BELOW

The following are the opinions of the United States Court of Appeals for the District of Columbia Circuit and the final decision on remand issued by the Department of Transportation ("DOT"):

1. *City of Los Angeles v. DOT*, 165 F.3d 972 (D.C. Cir.) (*"LAX II"*), *reh'g denied en banc*, 179 F.3d 937 (D.C. Cir. 1999), reprinted in the Appendix[1] at 1a.

2. Final Order on Remand, *Los Angeles Int'l Airport Rates Proceeding and Second Los Angeles Int'l Airport Rates Proceeding*, Dec. 23, 1997 ("Remand Decision"), App. 18a.

3. *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) (*"LAX I"*), App. 79a.

4. *City of Los Angeles v. DOT*, 179 F.3d 937 (D.C Cir. 1999) (denying rehearing of *LAX II*), App. 109a.

[1] Citations to "App." refer to the Appendices attached to the accompanying Petition for a Writ of Certiorari filed by the City of Los Angeles.

STATEMENT OF BASIS FOR JURISDICTION

The D.C. Circuit's decision in *LAX II* was entered on February 5, 1999. App. 1a. ACI-NA and the City of Los Angeles filed timely petitions for rehearing on March 22, 1999. The D.C. Circuit denied those petitions on June 18, 1999. The D.C. Circuit's jurisdiction was based on 49 U.S.C. § 47129(c)(5), 49 U.S.C. § 46110(a) and 5 U.S.C. §§ 701-06. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant portions of the following statutory provisions involved are contained in Appendix B to the accompanying petition filed by the City of Los Angeles:

49 U.S.C. § 40116

49 U.S.C. § 47107

49 U.S.C. § 47129

49 U.S.C. App. § 1513

49 U.S.C. App. § 2210

STATEMENT OF THE CASE

LAX's Adoption of Its Compensatory Rates and Charges Methodology. Operating agreements in effect for over 25 years between Los Angeles and the airlines using LAX expired in 1993. J.A. 29.[2] Those agreements required LAX to use a "residual" methodology for calculating landing fees, whereby the fees covered only the amount by which LAX's total expenses exceeded its revenues from all sources other than landing fees. As a result, the landing fees were subsidized by LAX's concession revenues and bore no relationship to the cost of services and facilities provided to airlines. J.A. 26-27.

Before expiration of the old operating agreements, Los Angeles retained a leading airport management consulting firm to reexamine its rates. The firm recommended a "compensatory" or "cost of service" methodology by which airlines would be charged for the full cost of the services and facilities they used. J.A. 30-31. Los Angeles adopted the recommendation and included in the landing fee a land rental charge for the use of LAX's locally-funded airfield land based on the land's fair market value.

By 1992, the airfield land's value greatly exceeded its historical cost. Most of the land had been acquired before 1955, at costs averaging $2,427 per acre. Land acquired between 1955 and 1976 averaged $204,327 per acre. The land was conservatively appraised at $150,000 per acre. After adjustment to exclude land acquired with federal

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[2] "J.A." citations to the record below refer to the Joint Appendix in the D.C. Circuit *LAX II* appeal.

grants, the annual fair rental charge for the LAX airfield land was set at $8,348 per acre. J.A. 35.

Statutes Affecting Reasonable Airport Rates and Charges. Two federal statutes addressing airport charges to airlines were in effect in 1993: (1) The Anti-Head Tax Act ("AHTA"), 49 U.S.C. App. § 1513(b) (subsequently recodified at 49 U.S.C. § 40116(e)(2)), which prevented the imposition of head taxes on airline passengers and specifically authorized State and local government proprietors to charge *"reasonable rental charges,* landing fees, and other service charges *from aircraft operators for the use of airport facilities"* (emphasis added); and (2) The Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. App. § 2210(a) *et seq.* (subsequently recodified at 49 U.S.C. § 47107(a)(13)(A)), which contained a grant condition requiring airports receiving grants to make airport facilities available "on fair and reasonable terms." The AAIA also expressly provided that airports "must maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . . " *Id.* § 2210(a)(9).

In *Northwest Airlines v. County of Kent,* 510 U.S. 355, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994), this Court upheld Kent County's use of a compensatory methodology in setting rates and rejected the airlines' attempt to require "cross-crediting" of non-airline revenues to pay the cost of aeronautical facilities. The Court held that an airport charge is reasonable "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not

discriminate against interstate commerce." 510 U.S. at 369.[3]

On August 23, 1994, Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") providing an expedited procedure for resolving airport-airlines rate disputes and directing the Secretary of Transportation to establish guidelines for determining the reasonableness of airport fees. 49 U.S.C. § 47129(b)(2). Congress expressly affirmed that airports may use compensatory methodologies. *Id.* § 47129(a)(2). The statute also noted that the Secretary may only determine whether the fee is reasonable and "shall not set the level of the fee." *Id.* § 47129(a)(3). Congress expressed no intention of overruling *Kent County*.

The Rates & Charges Policy. The Secretary's 1995 Policy Regarding Airport Rates & Charges provided that "[a]irport assets included in the rate base must be valued according to their historic cost to the original airport proprietor." 60 Fed. Reg. 6906, 6917 (Feb. 3, 1995). It also provided that for "facilities other than airfield facilities and land, an airport proprietor may use valuation methodologies other than historic cost valuation . . . so long as total aeronautical revenues do not exceed the total costs (based on historic costs) included in the aeronautical rate base . . . . " *Id.* § 2.4.1(a).

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[3] The Court noted that the Secretary of Transportation may adopt a more rigorous standard providing that such standard represents "a permissible construction of the statute." 510 U.S. at 368 n.14.

After soliciting additional comments regarding the Policy, the Secretary adopted his Final Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996). Despite an outpouring of criticisms of the historical cost requirement, the Final Policy retained the requirement for valuing airfield land assets. The Policy did, however, allow airports to base other aeronautical fees on methodologies other than historical cost, including fair market value.

Subsequently, on appeal, in *Air Transp. Ass'n of Am. v. DOT*, 119 F.3d 38 (D.C. Cir. 1997), the D.C. Circuit vacated portions of the Final Policy, including the airfield historical cost requirement. The D.C. Circuit criticized DOT's justifications for the Final Policy's requirement that airfield assets be valued at historical costs and held that DOT had not justified the use of two different standards for valuing aeronautical assets – historical costs for airfield assets and "any reasonable methodology" for non-airfield assets. 119 F.3d at 44. The Secretary has not yet adopted replacement provisions for the vacated portions.

The Airlines' Challenge and Los Angeles' Response. Immediately after issuance of the 1995 Policy, a group of airlines operating at LAX filed an Amended Complaint with DOT seeking to invalidate the 1993 fees. The airlines alleged that the fair market value-based land rental charge violated DOT's Policy and that the historical cost requirement was required by existing law and generally accepted accounting principles. J.A. 272. The airlines did not challenge the appraisal on which the land rental charge was based. App. 91a-92a.

Los Angeles responded that existing law fully supported the use of fair market value, that airlines had long paid fair market value in leasing land used for aircraft maintenance, cargo and terminal facilities at LAX, and that sound economic considerations supported that methodology. The City submitted declarations of Michael Brown, an airport expert, and three renowned economists, Professors Ferdinand Levy and Kenneth Arrow (a Nobel Laureate) and Dr. Frederick Warren-Boulton (a regulatory economist), explaining why historical cost valuation, particularly without any rate of return, made no sense. They pointed out:

- Land, unlike depreciable assets, generally appreciates. As a result, over time, the land's historical cost becomes an increasingly smaller fraction of its fair market value. Requiring the use of historical cost to value airfield land provides a subsidy to commercial air carriers.

- The historical cost requirement ignores the opportunity cost associated with providing the airfield land for the airlines' use, which opportunity cost is measured as the value of the land in its next best use. It also ignores such basic economic realities as inflation. The use of fair market value is a tool to achieve an efficient allocation of resources.

- The goal of regulation is to mirror prices set in a competitive market. Price in a competitive market equals opportunity cost. Even in regulated industries such as utilities (where the regulatory agency has the power to set the fee) the use of historical cost valuation is always coupled with an allowed reasonable

rate of return (for which DOT's Policy does not provide).

- The use of historical cost without an allowed rate of return could not possibly comply with the Congressional requirement that airports be as self-sustaining as possible. *See* J.A. 35-38, 77-93.

After a hearing before an Administrative Law Judge, the Secretary determined that Los Angeles' land charge was unreasonable because it was not based on the historical cost of the land. Although the Secretary's Final Decision referred to the Policy dozens of times, it concluded that the use of historical costs was required by existing law: "[W]e are construing an existing legal requirement, not creating a new one." J.A. 508. The Secretary did not address the substantial economic arguments and evidence against the historic cost requirement that Los Angeles presented.

While the ALJ had concluded that Los Angeles could charge a fee for the rental of the LAX land based on its historical cost, the Secretary decided that, with the exception of a small amount of debt service remaining,[4] LAX could not assess *any* land rental charge because LAX had paid the debt service on the historical cost of the land while operating under the residual agreements. J.A. 505, 510-11.[5]

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[4] At the time of the Secretary's final decision a small amount of debt service relating to the acquisition of the land remained to be paid.

[5] The ALJ determined that the landing fees paid under the residual agreements did not pay for the debt service on the land.

The D.C. Circuit's Conflicting *LAX I* and *LAX II* Decisions. In *Los Angeles Dep't of Airports v. DOT*, 103 F.3d 1027 (D.C. Cir. 1997) (*"LAX I"*), the Circuit reversed and remanded the Secretary's Final Decision, concluding that the Secretary had a "fundamental misunderstanding of the governing law." App. 90a. It observed that this Court has never "held that historic cost represents the only true measure of cost and the Secretary points to no law, regulation, or agency decision to that effect." App. 89a. The Circuit also explained that regulatory agencies and economists have recognized opportunity costs.[6] It concluded that nothing in existing law prescribed "an accounting, rather than an economic conception of cost in airport ratemaking," and the existing law did not require the use of any "single formula" in airport ratemaking. App. 89a-90a.[7]

J.A. 459. The airlines "could not say that landing fees paid the airline costs associated with the airfield and apron. . . . In fact, landing fees did not cover the airlines' portion of the airport's operating and maintenance expenses." J.A. 460 n.4.

[6] Opportunity costs, such as the costs of foregoing alternative uses of property, have been widely recognized by courts, economists and regulatory agencies. *See, e.g., LAX I*, 103 F.3d at 1032; *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 954 (D.C. Cir. 1993); *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1369 (7th Cir. 1985) ("[C]ourts now understand that an opportunity cost is a real cost.")

[7] Attempting "to avoid a useless round of litigation" the Circuit rejected DOT's other rationales for requiring the use of historical cost, noting that other airports' use of historical cost did not demonstrate that historic cost "is uniquely indicated under a compensatory regime." It also rejected DOT's contention that it is easier to value land on the basis of its historical cost than its fair market value. App. 91a-93a.

On remand, ACI-NA urged DOT not to strain to find an alternative basis to require the use of historical cost to the exclusion of all other methods of valuing airfield land. DOT had repeatedly concluded, in both the LAX litigation and in several versions of the Policy, that airfield land must be valued at historical cost, even though the law did not require its use, and there was no evidence in the record that LAX's fair market value based charge was unreasonable. The Secretary nevertheless embraced two arguments that the airlines had made unsuccessfully in *LAX I:* (1) federal grant assurances requiring LAX to operate as an airport meant that LAX had no opportunity cost to use the land in any other use, and, therefore, LAX was required to use historical cost valuation; and (2) the benefits to Los Angeles from operating LAX as an airport outweighed any opportunity cost. App. 38a, 51a-52a.

In *City of Los Angeles v. DOT,* 165 F.3d 972 (D.C. Cir.), *reh'g denied en banc,* 179 F.3d 937 (D.C. Cir. 1999) (*"LAX II"),* a different panel of the Circuit upheld the Secretary's historical cost requirement. Contrary to *LAX I,* the *LAX II* panel accepted the airlines' grant assurance and benefits arguments. The panel concluded that limiting the airport owner to recovery of historical cost was justified because, as a result of its agreement to the grant condition that LAX be available for public use as an airport, Los Angeles has no opportunity to use its locally-funded land for any purpose other than an airport. App. 10a-11a. *LAX II* also upheld the Secretary's conclusion that LAX's fee is unreasonable because it is "covered" by the "benefits" Los Angeles receives from having an airport. App. 13a.

The Circuit's Opinions on Rehearing. The opinions on rehearing were sharply divided. The concurrence

upheld DOT's decision, citing a deferential standard of review, although it acknowledged that economists would reach a different result. App. 110a-111a. The dissent made clear that "the agency cannot reject opportunity cost – or any other reasoned proposal offered by a party – without some reason." App. 113a.[8] The dissenters concluded that DOT's notion that opportunity costs are inapplicable if the owner of a resource is contractually obligated to use it for a specified purpose is a "non-sequitur," and that the determination that the grant assurances required the use of historical cost made no sense. The dissent also found incomprehensible the *LAX II* panel's acceptance of DOT's conclusion that the fee was unreasonable because the economic benefits of the airport to the City "covered" the opportunity cost of the land. App. 114a-116a.[9]

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[8] The concurring opinion erroneously stated that the distinguished economists who had given declarations in the original proceeding never appeared on remand. In fact, the Secretary, with the parties' concurrence, determined not to receive new evidence on remand. J.A. 670-71. The declarations of Prof. Levy and Dr. Warren-Boulton (who made the same points Prof. Arrow had made) however, were part of the remand record as well as the record on appeal. *See* J.A. 77-86, 87-93.

[9] The grant assurance and benefit arguments are not even mentioned in the Secretary's Final Decision following the proceeding before the ALJ. *See* J.A. 578-637. It was only on appeal that these arguments were made, in violation of DOT's rule that the airlines' entire grounds and evidence for challenging the fees were required to be set forth in their complaint. 14 C.F.R. § 302.605.

IMPORTANCE OF THE ISSUES PRESENTED

State and local governments that own and operate the Nation's principal airports depend on rates and charges imposed on airlines and other users of aeronautical facilities to fund operations, maintenance, improvements and developments. Forbidding airport proprietors from using fair market valuation of airfield land in calculating such rates and charges thwarts the will of Congress expressed in the AHTA, AAIA and FAAAA, cannot be reconciled with this Court's decision in *Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994), and creates unnecessary collisions with the Constitution and established principles of comity and federalism.

The issues presented are of vital importance to airports, to the Nation's air transportation system and to interstate and international commerce.

As established by the record in this case, the decision below gives the airlines the use of LAX's extremely valuable airfield land for *no charge* – thereby subsidizing commercial airlines at the expense of State and local governments. The decision below severely threatens the ability of those governments to meet the Nation's airport development needs in the 21st Century.

REASONS FOR GRANTING THE PETITION

LAX I and *Air Transp. Ass'n of Am. v. DOT*, 119 F.3d 38 (D.C. Cir. 1997) are in conflict with *LAX II*. In the former two cases, Circuit panels twice rejected the Secretary's determination that airfield land rental charges must be based solely on the historical cost of the land. *LAX II* reaches the opposite decision without any reasoned explanation for doing so. It upholds an interpretation of the applicable statutes in a manner that is contrary to Congress' expressed intent by relying on deference to the Secretary's arbitrary decision.

The intracircuit conflict in the District of Columbia Circuit should be of as much concern to this Court as intercircuit conflict is in other cases interpreting and applying federal law because of the pivotal role that the D.C. Circuit plays in reviewing Secretarial decisions and those of federal administrative agencies.[10]

LAX II does not explain why LAX land must be valued at historical cost. Nor does it explain why State and local governmental entities are required to provide such valuable locally-funded facilities for the use of profit-making air carriers without any charge, or why any deference should be accorded a decision of the Secretary that impermissibly adds new conditions to federal grant assurances. Freezing land values based on inapplicable grant provisions is every bit as unlawful and arbitrary as

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[10] *Cf. Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (in which the Court granted certiorari to resolve intracircuit conflict); *Maggie v. Zeitz*, 333 U.S. 56, 59-60 (1948) (same).

were the arguments to support historical costs previously advanced and rejected.

I. The Opinion Below Retroactively Adds New Conditions to the Federal Grant Statute Contrary to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

The two provisions of the AAIA grant conditions on which the Secretary relies[11] cannot be construed to prohibit the use of fair market valuation. They in no way suggest that grant recipients will be prohibited from charging fair market value-based rental charges for the use of locally-funded facilities, much less that they will be required to provide such facilities for the airlines' use without charge.[12]

Pennhurst held that new conditions cannot be added retroactively to grant assurances. The Court explained that federal funding legislation is "much in the nature of a contract: in return for federal funds, the States agree to

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[11] Section 47107(a)(1) states that the airport will be made available for public use on reasonable conditions; section 47107(a)(16) states that the Secretary must approve modifications to the airport layout plan.

[12] Absent a clear expression of congressional intent, the interpretation of the word "reasonable" in the AAIA cannot be different from the interpretation of that word in the AHTA. The legislative history of the AAIA contains no suggestion that Congress intended the word to have different meanings in the two acts. The *LAX I* panel expressly decided that the word "reasonable" in the AHTA does not preclude the use of fair market value or any other methodology. *LAX II* holds that "reasonable" in the AAIA precludes the use of fair market value.

comply with federally imposed conditions." 451 U.S. at 17. The Court said:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition of the grant of federal moneys, it must do so unambiguously. [Citations omitted.] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id.; see also Bennett v. New Jersey, 470 U.S. 632, 640-41, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985).

The decision below is in conflict with the Fourth Circuit's decision in *Virginia Dep't of Ed. v. Riley*, 106 F.3d 559 (4th Cir. 1997). In its *en banc* decision, the Fourth Circuit properly recognized *Pennhurst's* requirement that, in placing conditions upon States' receipt of federal funds, Congress must have affirmatively imposed the condition in "clear and unmistakable statutory terms." 106 F.3d at 562-63.

Contrary to the decision below, local governments never agreed retrospectively to give up their rights to recover fair market value-based charges for using locally-funded airfield land. Heretofore, no court or agency decision has ever interpreted the grant conditions – in effect for over seventeen years – to have any such effect.

If Congress had intended that States and local governments contribute their funds to airport assets, such as land, without being able to recover anything more than

the assets' historical costs, Congress would have clearly said so. It did not.

The panel below rejected the arguments advanced by the petitioners, stating that "we do not view the Department's reasoning as adding new conditions to the grant. Rather, the Department focused on a *consequence* of an unambiguously imposed condition – that the airport would be kept open for public use – that was present from the outset." App. 13a. The panel did not and cannot explain how forbidding the use of fair market valuation is relevant to keeping airports open or maintaining layout plans. Under no stretch of the imagination can it be said that States agreeing to accept Federal grants would have been cognizant of such a consequence of their participation.

II. No Deference is Due the Secretary's Decision Because it is Contrary to Congress' Intention that Airports Charge Reasonable Rental Rates and Be as Self-Sustaining as Possible.

In the AHTA, Congress expressed its intention that State and local governmental proprietors of airports may charge reasonable rental charges and landing fees from aircraft operators. 49 U.S.C. at § 1513(b). After this Court upheld the use of the compensatory methodology for landing fees, Congress reaffirmed that fees "may be calculated pursuant to either a compensatory or residual fee methodology or any combination thereof." 49 U.S.C. § 47129(a)(2). The compensatory methodology allows proprietors to recover the full costs of the facilities provided for the airlines' use. *LAX I* rejected the airlines'

argument for historical accounting costs rather than economic costs, observing that nothing in the existing law prescribed "an accounting rather than an economic conception of cost in airport ratemaking." App. 90a.

The decision below forecloses LAX from charging airlines *anything* for its most valuable asset – its airfield land. However, Congress was explicit that State and local governments are not to provide airlines free use of airport facilities, and it expressly forbade the Secretary from setting the level of the fees. 49 U.S.C. § 47129(a)(3). The panel's decision below disregards Congress' specific direction that airports must charge fees "that will make the airport as self-sustaining as possible under the circumstances existing at the airport." 49 U.S.C. § 47107(a)(13). The panel's conclusion also disregards the grant assurance requirement that if grant-acquired land is no longer needed for an airport, the owner "will *dispose of the land at fair market value* or make available to the Secretary an amount equal to the Government's proportional share of the *fair market value*. . . . " *Id.* § 47107(c)(2)(B)(i) (emphasis added).[13] The Secretary had no discretion to add any new condition to the grants, and no deference to his decision should have been given by the panel below.

The Secretary was not at liberty to foreclose fair market valuation of land used for airports and to mandate the use of historical costs because the result is an

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[13] Nothing in the grant assurances suggests that Congress intended to require *locally*-funded land to be valued at historical cost while requiring *federally*-funded land to be valued at fair market value.

absurdity that Congress never intended. Valuable facilities the historical cost of which has already been paid, but which have significant remaining life, would thereby have to be provided to the airlines *without charge*. Airports must rely on fair market value-based charges for the use of such facilities to sustain the financial integrity of airports – as Congress has required. By mandating the use of historical costs without providing an accompanying rate of return, the opinion below has thereby insured that prices will be *below competitive market prices*. No rational basis exists for requiring such a result.

The *LAX I* panel properly recognized that regulation is based on economic concepts, including the principle of opportunity costs. An opportunity cost is incurred when an alternative is foregone. That Los Angeles agreed to operate LAX as an airport for a period of years (and thus to forego alternative uses of the land) simply demonstrates that it has in fact incurred an opportunity cost. The *LAX II* panel plainly misapprehended not only the principle of opportunity cost, but also the goal of regulation, which is to mirror prices set in equilibrium in a competitive market. *See* J.A. 79, 91-93.

The *LAX II* panel's benefit theory is as untenable as would be a decision that owners of airport hotels must rent rooms to airline personnel at rates based solely on the land acquisition costs at the time the hotel was erected because the hotel owners benefit from airlines. Yet, without even waiting for the ink to dry on the decision below, the airlines have now argued to the Secretary that the fees for *other* non-airfield aeronautical facilities (terminals, hangars, cargo facilities, etc.) – which airports have long valued at fair market value without

complaint by airline users -- are unreasonable because they are outweighed by the benefits that the City derives from the airport. The derived benefits rationale does not even consider the benefits that cities and airports provide to airlines, nor does it consider the cost of airline operations borne by the surrounding communities (such as environmental and noise costs, traffic and roadway expenses, etc.).[14]

A similar derived benefits rationale was rejected by this Court in the *Kent County* case, in which the Court declined to require "cross-crediting." The airlines argued in that case that fees received by an airport from its concessionaires should be used to reduce airline charges because concessionaires benefit from airline operations. Passengers choose air travel because they wish to go some place. The airlines are the primary recipient of the derived benefit because it is the cities with their specific attributes that attract air commerce. Under the derived benefit logic, if all economic players were required to share profits based on the benefits they confer on each other, the airlines would have to share their profits with cities because the cities are the significant factor in creating a market for the airlines.

Under the panel's rationale, *any* cost of an airport could be said to be "covered" by the benefits derived from having an airport. That theory would apply equally

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[14] In an interdependent economy, all entities benefit in one manner or another from the activities of other entities. The gas station on the corner near Camden Yards benefits from baseball, but it is not required to pay for that benefit. The airlines benefit from Disneyworld, but do not pay Disney for it.

to historical costs. For example, the airlines could contend that the costs of repairing potholes in the runways is more than offset by the benefit the city receives from the airport and, thereby, the airlines would receive yet another subsidy from airport proprietors.

Taken to its logical conclusion, the benefits argument could prevent airports from charging landing fees *at all*, depending on a hypothesized benefit provided to the residents and businesses of sponsor cities.[15] The *LAX II* panel notes that DOT has not entirely prevented airports from charging landing fees. 165 F.3d at 979 n.4. The panel has not addressed the logical flaw exposed by the point, however. It is not rational to base a determination of reasonableness of a fee on whether it is "covered" by some *other* benefit.[16] Moreover, DOT *has* decided that LAX cannot charge anything for the use of the LAX airfield land.

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[15] Congress plainly did not intend such a result when it expressly authorized airports to charge air carriers "reasonable rental charges" for the use of airport facilities. If Congress had intended the derived benefits to offset reasonable rental charges, Congress would have added the proviso "unless the charge is outweighed by the benefits airport sponsors receive from the airport" at the end of the authorization language.

[16] The Court's definition of reasonableness in *Kent County* considered the fee in relation to the benefits conferred on the user for the use of the facility (i.e., whether the landing fee is reasonable in relation to the benefits the airlines receive from their use of the airfield) *not* the benefits that other airport users or the city derives from the airport. 510 U.S. at 367-39.

III. The Decision Below Violates the Tenth Amendment to the United States Constitution, as well as Established Principles of Comity and Federalism.

By requiring that State and local governments provide commercial air carriers use of airport facilities at rates and charges substantially below fair market value (or, in circumstances such as those at LAX where the historical costs of airport facilities supposedly have been recovered, at no charge at all), the decision below violates the Tenth Amendment.

Through the mandated subsidy, the DOT is effectively taxing those governments in the amount of the congressionally-authorized reasonable fees that they are expressly entitled to charge. Although congressional taxing powers may be delegated to the Executive Branch under some circumstances (*see Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-223 (1989)), Congress has never authorized the Secretary to require State and local governments to subsidize commercial air carriers. The airlines were unable to persuade Congress to require *federal* subsidization; no basis exists upon which DOT may require *State* and *local* government subsidization of airlines.

DOT's unlawful use of Congressional power violates fundamental principles of federalism – the counterpart to separation of powers that serves as a safeguard for political accountability and the protection of liberty. *Clinton v. City of New York*, 524 U.S. 417, 141 L. Ed. 2d 393, 421-23, 118 S. Ct. 2091, 2109-10 (1998). DOT is seeking to impose its requirement that State and local government airport proprietors subsidize commercial air carriers, without

any control by the citizens' congressional representatives. As this Court explained in *Clinton*, separation of powers not only operates on a horizontal axis to secure a proper balance of legislative, executive and judicial authority, but "operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised." *Id.* 141 L. Ed. 2d at 422-23, 118 S. Ct. at 2110.

The States of the Union are sovereign entities that must have a continuing "active participation in the fundamental processes of governance." *See Alden v. Maine*, 144 L. Ed. 2d 636, 653, 119 S. Ct. 2240, 2247 (1999). Consistent with those fundamental principles of federalism, this Court held in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), that Congress may not "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 176; *see also Printz v. United States*, 521 U.S. 898, 935, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . [as] such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

Neither the Environmental Protection Agency in *New York v. United States*, nor the Department of Justice in *Printz v. United States*, could enforce federal legislation found to be unconstitutional because it constituted federal "commandeering" of the legislative process of the States. DOT cannot do so either.

The Secretary's decision has intruded impermissibly on the sovereign powers of State and local governments by requiring them to use their legislative and executive powers to subsidize airlines. DOT has attempted to justify this intrusion on remand by embracing arguments not even mentioned in the Secretary's decision below prior to the *LAX I* appeal, and by retroactively adding new conditions to federal grant statutes – conditions to which the State and local governments accepting federal grants plainly did not agree. DOT has also attempted to circumvent clear statutory expressions of Congressional intent, all in an effort to justify a historical cost requirement for which the *LAX I* panel concluded there was no basis in existing law. DOT is forbidden to commandeer State and local governments to achieve DOT's policy, especially where DOT is acting in defiance of the expressed will of Congress.

CONCLUSION

For all the foregoing reasons, Petitioner ACI-NA, on behalf of the State and local government proprietors of the Nation's principal airports, urges that this Court grant this petition to decide the issues of great national importance presented by this case.

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Respectfully submitted,

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